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No. 615

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963.

DANNY ESCOBEDO,

Petitioner

vs.

STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

**BRIEF FOR
AMERICAN CIVIL LIBERTIES UNION
AMICUS CURIAE.**

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INTEREST OF AMICUS.

The American Civil Liberties Union, appearing herein with the consent of all parties, filed with the Clerk of the Court, is a national, non-partisan organization devoted solely to the protection and advancement of constitutional rights which are fundamental to the democratic way of life. *Amicus* believes in the necessity of securing to all persons suspected or accused of crime the right to consult with counsel at every stage in the course of criminal proceedings from arrest through final judgment and appeal. This case raises the vital question

of whether denial until after police interrogation has been completed of an arrested suspect's request to consult counsel violates the prisoner's rights under the due process clause of the Fourteenth Amendment. *Amicus* contends that the decisions of this Court in *Crooker v. California*, 357 U.S. 433 (1958) and *Cicenia v. Lagay*, 357 U.S. 504 (1958), which answer this question in the negative, should be reconsidered and overruled.

ARGUMENT.

I. Denial by the Police of an Arrested Suspect's Request to Consult Counsel Until After the Completion of Informal Police Interrogation Cannot Be Reconciled with the Principle of Fair Trial Embodied in the Due Process Clause of the Fourteenth Amendment.

In *Crooker v. California*, a majority of the Court refused to hold that denial of a request to consult counsel made by a suspect in police custody violated the suspect's rights under the due process clause of the Fourteenth Amendment. The majority opinion took the position that such a rule would "preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney" and would have a "devastating effect on enforcement of criminal law." 357 U.S. 433, 441. Similarly, the Illinois Supreme Court in the instant case upheld the propriety of "fair and reasonable" and "effective" questioning of a suspect in the custody of the police following their denial of the prisoner's request to consult counsel. Transcript of Record 130, 131, 134.

We urge that the Court reconsider its ruling in *Crooker* and the companion *Cicenia* decision and hold that a confession obtained during police interrogation of a suspect in custody following their denial of his request to consult counsel is inadmissible in evidence under the due process clause of the Fourteenth Amendment. Police interrogation under these circumstances is inherently coercive, involves a denial of the specific constitutional right to counsel and is fundamentally irreconcilable with the constitutional principle of fair trial embodied in the due process clause of the Fourteenth Amendment.

What is the "fair" police questioning which the majority opinion in *Crooker* deemed necessary to permit? What is the "fair and reasonable" and "effective" police questioning which was upheld by the Illinois Supreme Court in this case? These general terms can be understood only by examining the interrogation practices which are in actual use by American police today. Since police interrogation of arrested persons is characteristically conducted in privacy and without a record being made, the best sources for such understanding are the published manuals of police interrogation. The principal ones are cited below.¹

We urge the Court to examine these books. They are not exhibits in a museum of third degree horrors. Indeed they carefully advise the police interrogator to avoid tactics which are clearly coercive under prevailing law. They are invaluable because they vividly describe the kinds of interrogation practices which are accepted as lawful and proper under the best current standards of professional police work.

We speak only of the interrogation of suspects who are in police custody, that is, persons against whom the police have or should have probable cause to justify an arrest. What the police interrogation manuals reveal is

¹ Inbau and Reid, *Criminal Interrogation and Confessions* (1962); Inbau and Reid, *Lie Detection and Criminal Interrogation* (3rd ed., 1953); O'Hara, *Fundamentals of Criminal Investigation*, Ch. 9 (1956); Arther and Caputo, *Interrogation for Investigators* (1959); Kidd, *Police Interrogation* (1940); Mulbar, *Interrogation* (1951). A summary of the interrogation methods recommended in Inbau and Reid's classic, *Lie Detection and Criminal Interrogation* (3rd ed., 1953) is contained in Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. Crim. L., Crim. & Pol. Sci. 21, 22-26 (1961), reprinted in Sowle, ed., *Police Power and Individual Freedom* 153, 155-158 (1962).

that "fair and reasonable" and "effective" interrogation of such suspects has the following typical characteristics (references are to the leading manual in this field, Inbau and Reid, *Criminal Interrogation and Confessions* (1962)):

1. The principal purpose of the police interrogators is to obtain "confessions from the guilty and information from reluctant witnesses or other prospective informants." p. vii.

2. The length of the interrogation is governed principally by the discretionary judgment of the police interrogators. It may extend for several hours "depending on various factors, such as the nature of the case situation and the personality of the suspect." p. 207. The interrogator is urged to be patient.²

3. Such interrogation is conducted in privacy. The only persons present are police interrogators and the prisoner. pp. 1-9.

4. The prisoner is not permitted to talk to a lawyer or a member of his family or a friend until after his interrogation is completed. pp. 112, 167-173.

5. The prisoner is not told by his interrogators that he is not required to answer their questions. pp. 162-7. If the prisoner asserts his right not to answer questions, the interrogator will seek to discourage his uncooperative attitude and persist in urging him to confess. pp. 111-12.

6. The prisoner is not taken before a judicial officer for a preliminary hearing until the interrogation is completed. pp. 158-62.

² "It is well, therefore, to get the idea across, in most case situations, that the interrogator has 'all the time in the world.'" Inbau and Reid, p. 109.

7. No record of the actual interrogation is made. In the event of later disputes about the conduct of the interrogation, the available evidence is usually limited to the testimony of the defendant and the police who were present at the interrogation, pp. 1, 177-8.

8. In the course of the interrogation the prisoner may or may not be informed of the offense of which he is suspected, and may or may not be confronted by his accusers. pp. 81-88, 91.

9. The particular methods which are recommended for use in such "fair" interrogation include the following:

(a) Questioning the prisoner on the expressed assumption that he is guilty. Thus, the interrogator is counselled to "display an air of confidence in the subject's guilt" and "avoid having the subject indulge in repeated denials of guilt." pp. 23, 24.

(b) The use of pretended sympathy and other emotional appeals to establish a relationship of rapport and confidence between the prisoner and his interrogator. pp. 34-36, 55-60.

(c) The use of false statements to trick the prisoner. Two common examples are the bluff in which the interrogator falsely tells his prisoner that a confederate has confessed and implicated him and the interrogator's pretense that he has non-existent physical evidence of the prisoner's guilt. pp. 28, 81-88, 100.

(d) The encouragement of confession by condemning the victim of the crime, by minimizing the moral seriousness of the offense, or by suggesting the possibility that the accuser has exaggerated the offense. pp. 36-55, 60-66.

(e) Repeated accusations to the prisoner that he is lying, coupled with the exhortations to tell the truth. *passim*.

(f) Accusing the prisoner of other crimes of which he is actually believed innocent. pp. 62-66, 119-120.

(g) The use of certain allegedly common-sense principles for distinguishing guilty suspects, such as unwillingness to take a "lie detector" or "truth serum" test. pp. 100-105.

(h) The use of certain types of non-violent physical contact, such as securing the suspect's knees between the legs of the interrogator, holding the suspect's chin so that the interrogator can stare directly into his eyes, and clasp the suspect's fidgeting hands and twitching shoulders in order to "bottle up" natural expressions of nervousness.³

The above brief description is not a selection of the worst "horribles" from the interrogation manuals, but a neutral description of the interrogation methods which would apparently be generally approved by professional police today. However, the interrogation manuals may not always meet this standard. Consider the following examples:

Jolting

"The questioning is conducted at some length in a quiet, almost soothing manner. By constantly observing the suspect the investigator chooses a propitious moment to shout a pertinent question and appear as though he is beside himself with rage. The subject may be unnerved to the extent of confessing."

³ Arther and Caputo, *Interrogation for Investigators* (1959), 97-99; Inbau and Reid, pp. 23, 31.

⁴ O'Hara, *Fundamentals of Criminal Investigation*, 108. (1956).

Reverse Line-up

"This technique is applicable in crimes which ordinarily run in series, such as forgeries and muggings. The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations."

Lengthy Interrogations

"Where emotional appeals and tricks are employed to no avail [the investigator] must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable."

It is generally recognized that the type of police interrogation we have described involves the danger of abuses, not only physical mistreatment of the prisoner but also other abuses which are morally and psychologically equivalent to physical force. The relationship between the police interrogator and his prisoner unavoidably invites abuses,

* Id. 106.

* Id. at 112.

not because policemen are any more brutal than the rest of us, but because the officer's natural indignation at crimes of violence, his position of relative sophistication and control over the prisoner, the absence of disinterested observation and, above all, the frustration of suspended judgment, all lead him to justify the use of means which would be rejected if exposed to public scrutiny.

Realistically, the police interrogator who makes it clear to his prisoner that he has "all the time in the world" for their private interview is asserting the right to have his questions answered. Wigmore saw the problem very clearly when discussing the privilege against self-incrimination:

"The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, that is, to a confession of guilt."

The denial of counsel in the setting we have described is inherently coercive. As the majority opinion in *Crooker* recognized, coercion is more likely to result from the denial of a specific request for counsel than from the failure to appoint counsel immediately upon arrest. 357 U.S. 433, 438. The prisoner whose request for counsel is denied can reasonably infer that his interrogators intend to continue his imprisonment and interrogation until they are satisfied with the results. The one word rejecting his request may thus exert more effective coercion than hours of detention without any such rejection of a right asserted by the prisoner. At least where a prisoner

¹ Wigmore, *Evidence*, Sec. 2251, at 309 (3rd ed. 1940).

suspected of a capital crime has been denied access to counsel, his subsequent interrogation by police seeking a confession is fundamentally unfair and any resulting confession must be excluded from his trial under the due process clause of the Fourteenth Amendment.

The denial of counsel during police interrogation is also inconsistent with the specific constitutional right to counsel. The unanimous decisions in *Hamilton v. Alabama*, 368 U.S. 52 (1961) and *White v. Maryland*, 373 U.S. 59 (1963), hold that the right extends to any "critical stage in a criminal proceeding" irrespective of "whether prejudice resulted." It is generally recognized that the period immediately following arrest is one of the most critical stages in a criminal proceeding. This is the time when the prospective defendant needs a lawyer most.* The lawyer is needed at this stage not only to enforce the basic protections afforded all persons accused of crime, such as the right of silence, the right to bail, the right to be informed of a specific charge and to be presumed innocent thereof, and the right to immediate freedom if continued detention is illegal; he is also needed for the immediate preparation of the defense.

Four years ago a select committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association published an extensive study of the defense of indigents accused of crime. In its conclusions and recommendations, the committee stated:

"... [I]f the rights of the defendant are to be fully protected, the defense of a criminal case should begin as soon after arrest as possible. There is a strong

* Allison, He Needs a Lawyer Now, 42 J.Am.Jud.Soc. 113 (1958).

argument that the time a defendant needs counsel most is immediately after his arrest and until trial. During this period, unless the defendant has counsel, there is no one charged with the duty of protecting his interests and gathering the evidence which may be essential to his defense. The defendant, who is usually in jail, is incapable of doing anything to help himself and, while the prosecution is carefully building its case, the defendant's case may be destroyed by the mere passage of time.

"It is the opinion of this committee that representation must be provided early if it is to be effective. This conclusion is not affected by the argument that the prosecution will be impeded by defense counsel in the performance of its duties." Equal Justice for the Accused, (1959) p. 60."

The coercive influence which is implicit in denial of the prisoner's request for counsel and the prospective defendant's need for counsel indicate the importance of giving constitutional protection to the right to counsel before and during private interrogation by the police. There is, however, an even deeper sense in which private police questioning of arrested suspects is irreconcilable with the constitutional principle of fair trial.

The type of "fair and reasonable" and "effective" police interrogation which has been described in this brief and in effect sanctioned by the Illinois Supreme Court in this case adds a stage to criminal prosecutions which is not described in the statutes or judicial decisions relating to criminal procedure—a preliminary, secret and informal examination by interrogators whose actions are not governed by judicial standards and are essentially unsupervised. Indeed, the courts could not effectively supervise such pro-

* See also Beaney, Right to Counsel Before Arraignment, 45 Minn. L.Rev. 771, 780 (1961).

ceedings even if full records were made for review. How could the courts decide when "reasonable" interrogation had come to an end? Would the test be whether the police feel that they have exhausted the possibilities of obtaining information by further interrogation? Would it be whether they have had an adequate opportunity to try the sympathetic approach, the "friend and enemy act," "bluffing on a split pair" and the other formulae in the interrogator's guide? How many times should it be proper to urge the prisoner to confess before reasonable interrogation has come to an end? Is the reasonableness of an interrogation opportunity to be measured by the result? How many times should the police be "reasonably" entitled to press for an answer or refuse to accept explanations which they think false? Does the length of "reasonable" interrogation vary directly or inversely with the determination of the prisoner to remain silent or persist in answers which the police disbelieve?

The contrast between interrogation in a police station and the standards of fairness which are required in judicial hearings could hardly be greater. Proceedings in a court are open and dominated by an insistence on procedural regularity. The conflict of interest between the accused and the prosecution is recognized explicitly and mediated by an impartial judge. Although the same conflict is present in the police station, where the prisoner-suspect is in jeopardy of a criminal charge, the prospective defendant is nevertheless left under the supervision and control of investigators who naturally share the purposes and outlook of the prosecutor.

A thoughtful police official has described some of the resulting problems:

"Officers who have formed definite opinions as to guilt or circumstances may innocently exert a strong influence on the statements of witnesses whom they interrogate. Furthermore, when investigators allow theories of situations to form before there are sufficient facts disclosed to support them, they are likely to find their subsequent investigation restricted to a search for facts to lend support to the ill-conceived theory. . . .

"Many hazards instantly appear when a criminal investigation centers upon certain suspects because of theories prematurely entertained. The most troublesome of these hazards is that of premature arrest. Arrests of this character are not made by reason of a logical analysis of supporting facts, but they occur by reason of the influence of the preconceived theory, strengthened in part by other conjectures such as the probability of the suspect escaping the immediate jurisdiction, or as in many instances, the hope that by severe grilling the suspect may be brought to the point of putting his own neck in the noose by confessing his crime. In every instance of premature arrest it eventually becomes apparent that there is not sufficient real evidence to support a specific charge. This condition leads to further compromising situations, and the effect of the troublesome factors are forestalled or delayed by resorting to other questionable practices, thus setting off a chain of illegal action that may run the gamut of condemned practices, from the filing of unjustified vagrancy charges with exorbitant bail, through incommunicado confinement to escape the writ of habeas corpus; coercive grilling, in the hope of securing a confession; third degreeing when coercion fails; and even on up to actual 'framing,' which has too frequently occurred.

"Policemen, in their eagerness to detect crime and to apprehend and bring criminals to justice, are inclined to overlook the importance of separation of governmental function as a safeguard of personal liberty. They are wont to usurp the prerogatives of the judiciary in fixing the guilt or innocence of the accused, and in eagerness to assert this pseudo authority will resort to practices that are questionable or highly irregular if not actually illegal."¹⁰

Informal and unsupervised examination of arrested suspects by police interrogators is fundamentally unfair to the police interrogators as well as the prisoner. Left with virtually unlimited discretion, the interrogator becomes the sole judge of what is proper questioning. His position is impossibly conflicting. On the one hand, he is expected to act as an agent for the prosecuting authorities, to collect evidence and, if possible, to secure confessions. On the other hand, he is expected to treat his prisoners fairly and objectively. He is expected to meet this standard without the guidance of clear rules or disinterested scrutiny and review. Under these circumstances it is unfair to give such broad power to the most disciplined and conscientious men and expect them to exercise it in accordance with judicial and constitutional standards of fairness.

At least where a prisoner suspected of a capital crime has been denied access to counsel, his subsequent interrogation by police seeking a confession is fundamentally unfair and any resulting confession must be excluded from his trial under the due process clause of the Fourteenth Amendment.

¹⁰ Kooken, *Ethics in Police Service* 54, 55 (1957).

II. The Denial of Counsel to Arrested Suspects Cannot Be Justified on the Ground that Law Enforcement Will Be Unduly Hampered.

The view that counsel in the police station will "hand-cuff" the police is the position taken by the majority in *Crooker* and *Cicenia* and, of course, by most prosecutors and police officials. With due respect we submit that this oft-stated contention is only an assumption, not a conclusion based on fact. The variables which determine the efficiency of criminal investigation and successful prosecution are so complex that no one really knows the extent to which seemingly more restrictive rules in this area actually do or will hamper the police. At present, only one thing is certain: it is yet to be demonstrated that effective crime control varies inversely with the enforcement of constitutional rights.¹¹

Given the complexity of the problem and the lack of reliable data, the courts are not in a position to make informed judgments about the effects of particular constitutional rules on police efficiency. What the courts can and should do is insure the basic constitutional right of prospective defendants to a fair trial. If that right is protected by restricting the power of the police to deny counsel, and legitimate police work is hampered as a result, then it is the responsibility of the community to provide

¹¹ *Kamisar, Public Safety v. Individual Liberties: some "Facts" and "Theories"*, 53 J. Crim. L. Crim. & Pol. Sci. 171, 184-93 (1962). Also see Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, Wash., D.C. (1962), possibly the only statistical survey ever made of arrests for investigation:

"The conclusion must be that the generous interrogation privileges which the present practice of arrests for 'investigation' furnishes to the police result in the charging of relatively very few offenders." p. 33.

the police with the human and material resources needed to do a better job. The supposed price for police efficiency should not be imposed entirely on the suspect held in police custody.

Assertions that the police would be "handcuffed" by the protective rule urged here cannot justify the virtually unlimited discretionary power which is at issue in this case, a power which effectively nullifies the basic and historic right to fairness in a criminal proceeding.

CONCLUSION.

For the reasons stated, *amicus* prays that the judgment of the Illinois Supreme Court be reversed.

Respectfully submitted,

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